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SAN FRANCISCO COUNTY
SUPERIOR COURT

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CASE MANAGEMENT CONFERENCE SET

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DEPARTMENT 212

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10 AS YOU SOW

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO

13 AS YOU SOW, a non-profit corporation,
14 Plaintiff,
15 v.
16 VITACOST.COM, INC., doing business as
17 NUTRACEUTICAL SCIENCES
18 INSTITUTE,
19 Defendant.

Case No. CGC-08-478195

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

(Cal. Health & Safety Code §25249.5, *et seq.*)

20 Plaintiff AS YOU SOW ("AYS") brings this action in the interests of the general public
21 and, on information and belief, hereby alleges:

INTRODUCTION

22 1. This action seeks to remedy Defendant's continuing failure to warn thousands
23 of consumers in California that they are being exposed to chemicals known to the State of
24 California to cause cancer and/or reproductive toxicity. Defendant imports, manufactures,
25 packages, distributes, markets and/or sells herbs and herbal products, traditional patent
26 medicines, bulk herbs, infusions, extracted powders, tea pills, traditional pills, patent formulas,

1 bulk teas, liquid extracts, tablets and/or capsules containing lead or lead compounds (referred
2 to collectively hereinafter as the "PRODUCTS").

3 2. Lead and lead compounds (collectively, the "LISTED CHEMICALS") are
4 chemicals known to the State of California to cause cancer and/or reproductive toxicity.

5 3. The ingestion of the PRODUCTS causes exposures to the LISTED
6 CHEMICALS at levels requiring a "clear and reasonable warning" under California's Safe
7 Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code ("H&S Code")
8 § 25249.5, *et seq.* (also referred to herein as "Proposition 65").¹ Defendant has failed to
9 provide these health hazard warnings as required by Proposition 65.

10 4. By this action, Plaintiff seeks appropriate relief:

- 11 a. prohibiting the continued import, manufacture, packaging, distribution,
12 marketing, or sale of the PRODUCTS in California by Defendant
13 without provision of clear and reasonable warnings regarding the risks of
14 cancer and/or reproductive toxicity posed by exposure to the LISTED
15 CHEMICALS through the ingestion of the PRODUCTS; and,
16 b. assessing civil penalties in the amount of \$2,500 per day per violation to
17 remedy Defendant's ongoing failure to provide clear and reasonable
18 warnings to thousands of individuals that they are being exposed and
19 continue to be exposed to LISTED CHEMICALS through the ingestion
20 of the PRODUCTS.

21
22 **JURISDICTION AND VENUE**

23 5. This Court has jurisdiction over this action pursuant to California Constitution
24 Article VI, Section 10, which grants the Superior Court "original jurisdiction in all causes
25 except those given by statute to other trial courts." The statutes under which this action is
26 _____

¹ All statutory and regulatory references herein are to California law.

1 brought do not specify any other basis for jurisdiction.

2 6. This Court has jurisdiction over Defendant because, based on information and
3 belief, Defendant is a corporation or association doing sufficient business in, and having
4 sufficient minimum contacts with, California, or otherwise intentionally availing itself of the
5 California market through the manufacture, packaging, distribution, marketing and/or sale of
6 the PRODUCTS in the State of California to render the exercise of jurisdiction over it by the
7 California courts consistent with traditional notions of fair play and substantial justice.

8 7. Venue in this action is proper in the San Francisco Superior Court because
9 Defendant has violated one or more of the California laws specified herein in the City and
10 County of San Francisco and/or has its principal place of business in San Francisco.

11
12 **PARTIES**

13 8. Plaintiff AS YOU SOW (“AYS”) is a non-profit foundation organized under the
14 State of California’s Non-Profit Public Benefit Corporation Law. AYS is dedicated to, among
15 other causes, the protection of the environment, the promotion of human health, the
16 improvement of worker and consumer safety, and environmental education. AYS is based in
17 San Francisco, California.

18 9. AYS brings this enforcement action in the public interest pursuant to H&S Code
19 §25249.7(d).

20 10. Defendant VITACOST.COM (“VITACOST”) is a person within the meaning of
21 H&S Code § 25249.11 and is doing business as NUTRACEUTICAL SCIENCES INSTITUTE.

22 11. VITACOST imports, manufactures, packages, distributes, markets and/or sells
23 one or more of the PRODUCTS for sale or use in California or otherwise causes or contributes
24 to exposures within the meaning of H&S Code § 25249.6, *et seq.* to the LISTED CHEMICALS
25 from the PRODUCTS.

1 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR
2 § 25000, *et seq.*; H&S Code § 25249.6, *et seq.*)

3 17. Plaintiff is informed and believes, and based on such information and belief
4 alleges, that one or more of the PRODUCTS have been sold to and/or ingested by individuals
5 in California without clear and reasonable warning since at least February 27, 2007. The
6 PRODUCTS continue to be offered for sale in California without the requisite warning
7 information.

8 18. As a proximate result of acts by Defendant, as a person in the course of doing
9 business within the meaning of Health & Safety Code § 25249.11, individuals throughout the
10 State of California, including in the County of San Francisco, have been exposed to the
11 LISTED CHEMICALS without clear and reasonable warning. The individuals subject to the
12 violative exposures include normal and foreseeable users of the PRODUCTS, as well as all
13 other persons exposed to the PRODUCTS.

14 19. At all times relevant to this action, Defendant knowingly and intentionally
15 exposed the users of the PRODUCTS to the LISTED CHEMICALS without first giving a clear
16 and reasonable warning to such individuals.

17 20. Individuals ingesting the PRODUCTS are exposed to the LISTED
18 CHEMICALS in excess of the levels determined to cause "no observable effect" or "no
19 significant risk", as applicable, within the meaning of H&S Code § 25249.10(c).

20 21. At all times relevant to this action, Defendant has, in the course of doing
21 business, failed to provide individuals ingesting the PRODUCTS with a clear and reasonable
22 warning that the PRODUCTS expose individuals to the LISTED CHEMICALS.

23 22. The PRODUCTS continue to be offered for sale in California without the
24 requisite clear and reasonable warning.

25 **FIRST CAUSE OF ACTION**
26 **(Violations of Health and Safety Code § 25249.6, *et seq.*)**

23. Plaintiff realleges and incorporates by reference Paragraphs 1 through 22,

1 inclusive, as if specifically set forth herein.

2 24. Beginning on or about February 27, 2008, AYS sent 60-Day Notices of
3 Proposition 65 violations to the requisite public enforcement agencies and to Defendant. These
4 notices were issued pursuant to, and in compliance with, the requirements of H&S Code §
5 25249.7(d) and the statute's implementing regulations regarding the notice of the violations to
6 be given to certain public enforcement agencies and to the violator. The notices given included,
7 *inter alia*, the following information: the name, address, and telephone number of the noticing
8 individual; the name of the alleged violator; the statute violated; the approximate time period
9 during which violations occurred; and descriptions of the violations, including the chemicals
10 involved, the routes of toxic exposure, and the specific products and type of products causing
11 the violations. The named defendant(s) and the California Attorney General were provided
12 copies of the 60-Day Notice by certified mail. Additionally, the named defendant(s) was
13 provided a copy of a document entitled "The Safe Drinking Water and Toxic Enforcement Act
14 of 1986 (Proposition 65): A Summary," which is also known as Appendix A to Title 27 of CCR
15 § 25903.

16 25. The appropriate public enforcement agencies have failed to commence and
17 diligently prosecute a cause of action under H&S Code § 25249.5, *et seq.* against Defendant
18 based on the allegations herein.

19 26. By committing the acts alleged in this Complaint, Defendant, at all times relevant
20 to this action, and continuing through the present, has violated H&S Code § 25249.6 by, in the
21 course of doing business, knowingly and intentionally exposing individuals who ingest the
22 PRODUCTS to the LISTED CHEMICALS, without first providing a clear and reasonable
23 warning to such individuals pursuant to H&S Code §§ 25249.6 and 25249.11(f).

24 27. By the above-described acts, Defendant is liable, pursuant to H&S Code §
25 25249.7(b), for a civil penalty of up to \$2500 per day for each unlawful exposure to a LISTED
26 CHEMICAL from the PRODUCTS.

28. An action for injunctive relief under Proposition 65 is specifically authorized by

1 Health & Safety Code § 25249.7(a).

2 29. Continuing commission by Defendant, of the acts alleged above will irreparably
3 harm the citizens of the State of California, for which harm they have no plain, speedy, or
4 adequate remedy at law.

5 Wherefore, plaintiff prays judgment against Defendant, as set forth hereafter.

6
7 **INJUNCTIVE RELIEF**

8 30. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 29,
9 as if specifically set forth herein.

10 31. By committing the acts alleged in this Complaint, the Defendant has caused
11 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence
12 of equitable relief, Defendant will continue to create a substantial risk of irreparable injury by:

- 13 a. continuing to cause consumers to be involuntarily and unwittingly exposed
14 to the LISTED CHEMICALS through the ingestion of the PRODUCTS;
15 and,
16 b. preventing consumers from distinguishing products that cause exposures to
17 lead and lead compounds from similar products that do not cause such
18 exposures.

19
20 **PRAYER FOR RELIEF**

21 Wherefore, Plaintiff accordingly prays for the following relief:

22 A. a preliminary and permanent injunction, pursuant to H&S Code § 25249.7(b)
23 enjoining Defendant, its agents, employees, assigns and all persons acting in concert or
24 participating with Defendant from importing, manufacturing, packaging, distributing,
25 marketing or selling the PRODUCTS in California without first providing a clear and
26 reasonable warning that the users of the PRODUCTS are exposed, within the meaning of
Proposition 65, to the LISTED CHEMICALS.

1 B. an assessment of civil penalties pursuant to H&S Code § 25249.7(b), against
2 each Defendant in the amount of \$2500 per day for each violation of Proposition 65;

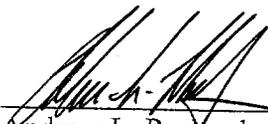
3 C. an award to Plaintiff of its reasonable attorneys fees and costs of suit pursuant to
4 California Code of Civil Procedure § 1021.5 as Plaintiff shall specify in further application to
5 the Court; and,

6 D. such other and further relief as may be just and proper.

7
8 DATED: August 4, 2008

Respectfully Submitted,

9 LAW OFFICES OF ANDREW L. PACKARD

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12 _____
13 Andrew L. Packard
14 Michael P. Lynes
15 Attorneys for Plaintiff
16 AS YOU SOW
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